Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-92-7

FACTS:

You are a legislative aide for a member of the General Court, who is a candidate for re-election. You are also a partner in a small business that occasionally does political consulting. Through this business, you wish to engage in campaign work for the legislator's re-election campaign, with compensation from his campaign political committee to your business. You may also wish to do such compensated campaign work for other incumbent legislative candidates and for other candidates.

The possible campaign work would include general campaign management, and writing letters and releases. It would not directly or indirectly include fundraising activities. You would conduct this campaign work away from the State House and on your own time.

QUESTIONS:

1. Does G.L. c. 268A allow a member of the General Court to compensate you for this campaign work while you are his legislative aide?

2. Does G.L. c. 268A allow you to do such compensated campaign work for other candidates?

ANSWERS:

1. No, unless (a) your decision to engage in this work is entirely voluntary, (b) you initiated the business relationship, and (c) the legislator publicly discloses in writing the facts clearly showing (a) and (b).

2. Yes, if an incumbent candidate is not your direct or indirect supervisor, and subject to the limitations discussed below. If an incumbent candidate is your direct or indirect supervisor, the answer is the same as for Question 1.

DISCUSSION:

The state conflict of interest law, G.L. c. 268A, applies both to you as a state legislative aide, and to the member of the General Court, as "state employees."[1/] Section 23 of G.L. c. 268A contains standards of conduct that apply to all public employees. In particular, §23(b)(2) provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value for himself or others. Section 23(b)(3) prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties.

In a long series of opinions and adjudicatory decisions, we have applied these broad provisions to private business relationships between public employees and those whom they oversee in their official duties — subordinate employees, vendors, and persons subject to their regulatory jurisdiction. First, we have consistently held that §23(b)(2) and its predecessors[2/] flatly prohibit public employees from soliciting such private business relationships from those whom they oversee. *EC-COI-81-66* (state corrections officer could not solicit catalogue orders from inmates he supervised); *EC-COI-82-64* (state employee who had side business selling household products could not sell them to employees and consultants that he supervised); *EC-COI-82-124* (county commissioner could not

solicit private insurance business from county vendors); *EC-COI-84-61* (legislator could not market tax shelters to persons with an interest in legislative business); *In re Burke*, 1985 SEC 248 (fining official for using his official position to obtain access for private purposes to persons his agency regulated);[3/] *In re Singleton*, 1990 SEC 476 (fining a fire chief for attempting to use his official position to obtain private business). Such solicitations inevitably involve unwarranted privileges by virtue of the supervisory employee's power over the person under his jurisdiction.

Moreover, we have recognized that the inherently exploitable nature of public employees' private business relationships with those under their jurisdiction presents serious problems even without an actual finding that the public employee actively solicited the business. In these situations, we have construed §23(b)(3) and its predecessors[4/] to require at least public written disclosure of the private business relationship. *Advisory No. 1* (1983) (public employees should "refrain altogether from using the private services of a vendor/consultant over whom that person has official responsibility," at least without disclosing); *In re Keverian*, 1990 SEC 460 (Speaker of the House admitted that private business relationships with office employees and vendors, without disclosure, violated §23[b][3]); *In re Garvey*, 1990 SEC
478 (same for Sheriff). We have explained the reasons for our concerns, even in the absence of actual solicitation by the supervising employee, as follows:

> The Commission has consistently stated that public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities. In the Commission's view, the reason for this prohibition is two-fold. First, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

In re Garvey, 1990 SEC 478, 479-80; *In re Keverian*, 1990 SEC 460, 462 (citations omitted).

Because of the above concerns we have expressed about the inherently coercive nature of these relationships, even when the supervisory employee did not actually solicit the private business, we have occasionally suggested that §23(b)(2) and (3) should be read together to require something more than the usual disclosure. *See, e.g., EC-COI-90-9*, n.9 (§23[b][2] suggests that state official should not attend campaign meeting at which his agency's vendors are present, because the circumstances might "inevitably be construed as coercive"). We now clarify that a public employee's private business relationship with a subordinate employee, a vendor whose contract he supervises, or a person or entity within his regulatory jurisdiction, violates §23, unless (1) the relationship is entirely voluntary; (2) it was initiated by the person under the supervisory employee's jurisdiction; and (3) the supervisory employee's public written disclosure under §23(b)(3) states facts clearly showing elements (1) and (2).[5/] Thus, failure to meet elements (1) or (2) will violate §23(b)(2); failure to make the disclosure required by (3) will violate §23(b)(3).

It remains to apply this rule to your situation. Your employment supervisor is a member of the General Court and has substantial authority to change your working conditions and even to terminate your state employment. His hiring you or your company to do campaign work would thus constitute just the sort of private business relationship with a subordinate that §23(b)(2) and (3) closely regulates.[6/] Therefore, your legislator may not agree with you to undertake such campaign work for compensation,[7/] unless the legislator makes a written disclosure to the Clerk of the respective chamber of the General Court and to this Commission, clearly showing that you initiated an entirely voluntary relationship.

Whether you could do paid work for another legislator's re-election campaign without such a disclosure would depend on whether that legislator directly or indirectly supervises your work or otherwise exercises substantial influence over your employment future, wages, benefits, or working conditions. For example, the Speaker probably exercises such supervisory influence over most House employees. Under such circumstances, the same analysis as for your own legislator would apply to this private business relationship.

Otherwise, you are free to do compensated campaign work for any incumbent or non-incumbent candidate.

Any campaign work you do while a public employee is subject to the following limitations. As you recognize, §23(b)(2) prevents you from using your paid time as a state employee, and other state resources and facilities, to benefit any such candidate. *See Commission Advisory No. 4 (Political Activity)* (1984); *EC-COI-92-5; 92-8* (both also authorized today). You could not act as agent or attorney for, or receive compensation from, any campaign committee in connection with any particular matter in which the state was a party or had a direct and substantial interest, such as a matter relating to the administration of the election itself. G.L. c. 268A, §4. (For example, a campaign could not pay you to review an opponent's nomination signatures as part of an objection proceeding before the State Ballot Law Commission under G.L. c. 55B.) Finally, G.L. c. 55 also regulates your campaign

activities as a state employee;[8/] for details, you should contact the state Office of Campaign and Political Finance.

Date Authorized: March 12, 1992

[1/]"State employee" is defined in relevant part as "a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, §1(q). "State agency," in turn, is defined as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town." *Id.* §1(p).

[2/]*See* G.L. c. 268A, §23(d), as appearing in St. 1962, c. 779, §1, and as amended by St. 1975, c. 508; G.L. c. 268A, §23(§2)(2), as appearing in St. 1982, c. 612, §14.

[3/]The Commission relied primarily on §3 in this case, which was decided at a time when the Commission lacked authority to enforce §23. *See Saccone v. State Ethics Commission*, 395 Mass. 326 (1985); St. 1986, c. 12, §§2, 6 (rewriting §23 and conferring Commission jurisdiction to enforce it as of April 8, 1986). *See also in re Burke*, 1985 SEC 248, 249 nn.4 & 5, 253 n.12.

[4/]*See* G.L. c. 268A, §23(e), as appearing in St. 1962, c. 779, §1; G.L. c. 268A, §23(§2)(3), as appearing in St. 1982, c. 612, §14. The present §23(b)(3), as appearing in St. 1986, c. 12, §2, for the first time added the defense of written disclosure.

[5/]Because the Commission has not previously stated this rule clearly, it will apply only prospectively. *See EC-COI-91-14* (advising legislator to disclose his private employment of his administrative aide, but not specifying elements of disclosure). Furthermore, the rule will not apply to a private business relationship that began before the supervisor's public employment. Finally, the rule may not apply in certain situations where objective standards governing the private business relationship remove or substantially mitigate the risk of coercion or improper influence (for example, to a routine purchase at retail by a state regulator, from a business subject to his regulation).

[6/]The violation of §23 would be principally the legislator's, not yours. Although the Commission usually renders advice only to the affected public employee, **see** G.L. c. 268B, §3(g), analyzing the law's application to the legislator is necessary here to advise you about your conduct.

[7/]This analysis would not apply to your work for the campaign of your legislator (or any other candidate) without compensation, as this is not the sort of private business relationship that §23 closely regulates. Of course, proof that a public employee coerced another public employee (or anyone else) to work for a campaign without compensation would still violate §23(b)(2). *See* G.L. c. 56, §§33-36 (criminal statutes regulating use of official authority to influence political action).

[8/]For example, G.L. c. 55, §13 prohibits appointed, compensated public employees from directly or indirectly soliciting or receiving funds for any political purpose.